

NO. 84711-8

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of

CARLOS JOHN WILLIAMS,

Petitioner.

**ANSWER TO PETITIONER'S MOTION FOR DISCRETIONARY
REVIEW**

ROBERT M. MCKENNA
Attorney General

DOUGLAS W. CARR
WSBA #17378
Assistant Attorney General
Corrections Division
PO Box 40116
Olympia WA 98504-0116
(360) 586-1445

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2011 FEB 18 P 3:28
BY RONALD R. CARPENTER
CLERK

ORIGINAL

TABLE OF CONTENTS

I.	RESPONDENT	1
II.	DECISION BELOW	1
III.	ISSUE FOR REVIEW.....	1
IV.	STATEMENT OF THE CASE	1
V.	ARGUMENT	1
	Petitioner Has Not Met The Criteria For Discretionary Review.....	1
VI.	CONCLUSION	6

TABLE OF AUTHORITIES

Cases

<i>Bellamy v. Bradley</i> , 729 F.2d 416 (6th Cir. 1984)	5
<i>Brewton v. Hollister</i> , 948 F. Supp. 244 (W.D.N.Y. 1996)	5
<i>Farmer v. Brennan</i> , 511 U.S. 825, 114 S. Ct. 1970 (1994)	5
<i>Gardner v. Beale</i> , 780 F. Supp. 1073 (E.D. Va. 1991)	5
<i>Hoptowit v. Ray</i> , 682 F.2d 1080 (9th Cir. 1986)	4
<i>Islam v. Jackson</i> , 782 F. Supp. 1111 (E.D. Va. 1992)	5
<i>Neal v. Wallace</i> , 15 Wn. App. 506 P.2d (1976)	3
<i>Prisoner's Legal Ass'n v. Roberson</i> , 822 F. Supp. 185 (D.N.J. 1993)	5
<i>Rhodes v. Chapman</i> , 452 U.S. 337, 101 S. Ct. 2392, (1981)	4
<i>Talib v. Gilley</i> , 138 F.2d 211 (5th Cir. 1998)	5
<i>Wilkins v. Roper</i> , 843 F. Supp. 1327 (E.D. Mo. 1994)	5
<i>Wilson v. Seiter</i> , 501 U.S. 294, 111 S. Ct. 2321 (1991)	5

Rules

RAP 13.4.....	2
RAP 13.5.....	2
RAP 16.11.....	1
RAP 16.14.....	1

I. RESPONDENT

The Respondent is the Washington State Attorney Generals' Office which was designated as the Respondent in this matter pursuant to the February 2, 2011 letter from Supreme Court Deputy Clerk Susan L. Carlson.

II. DECISION BELOW

The decision below is an unpublished order by Chief Judge J. Robert Leach of the Washington State Court of Appeals (Division I) entered on June 1, 2010 dismissing Mr. Williams' Personal Restraint Petition (PRP).

III. ISSUE FOR REVIEW

Whether Petitioner has demonstrated that he is entitled to discretionary review of the Court of Appeals' June 1, 2010 decision treating his civil action as a PRP and dismissing the PRP as meritless under RAP 16.11(b).

IV. STATEMENT OF THE CASE

Respondent accepts as accurate Petitioner's statement of the case.

V. ARGUMENT

Petitioner Has Not Met The Criteria For Discretionary Review

RAP 16.14(c) states that if a personal restraint petition is dismissed by the Chief Judge of the Court of Appeals, the dismissal may be reviewed

by the Supreme Court only by a motion for discretionary review in compliance with RAP 13.5A. In ruling on motions for discretionary review pursuant to RAP 13.5A, this Court will apply the considerations set out in rule 13.4(b). The standards for discretionary review under RAP 13.4(b) are as follows:

A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Petitioner has not met his burden of showing that this Court should accept review under the criteria set forth in RAP 13.4(b) as Petitioner has failed to demonstrate that the Court of Appeals' decision is in conflict with a decision of this Court or the other Courts of Appeals, or that this case involves either a significant constitutional issue or an issue of substantial public interest.

While Petitioner has not demonstrated that he has satisfied the criteria for discretionary review, he nonetheless argues that the Superior Court and Court of Appeals erred in treating his civil action as a PRP. Respondent agrees with Petitioner on this point as Petitioner did not title

his action as a PRP and nothing in Petitioner's action has any of the hallmarks of a PRP; his complaint only seeks money damages against the Department of Corrections (DOC) for alleged violations of his federal constitutional rights and does not claim that he is unlawfully restrained. Nevertheless, this apparent error does not provide a basis to grant discretionary review for the reasons set forth below.

Petitioner argues that this Court should grant review and order the Superior Court to allow him to proceed in forma pauperis in this case, citing to *Neal v. Wallace*, 15 Wn. App. 506, 550 P.2d (1976). However, under *Neal v. Wallace, supra*, the Superior Court did not err in refusing to allow Petitioner to file his action at public expense.

In order to be allowed a waiver of fees and to proceed at public expense in a civil action, a plaintiff must show:

(1) . . . actual, not theoretical indigency; (2) that but for such waiver a litigant would be unable to maintain the action; (3) that there are no alternative means available for procuring the fees; and (4) that plaintiff's claim is 'brought in good faith and with probable merit.'"

Id. at 508-09.

The waiver of fees for an indigent litigant is discretionary with the trial court. *Id.*

Although the Superior Court did not articulate its reasons for denying Petitioner's request to file his civil damages case against the DOC

at public expense,¹ the Superior Court's decision is supportable as Petitioner has not demonstrated that his claims stemming from a single missed meal have "probable merit". *Id.*

Petitioner claims that his missed meal violated his Eighth Amendment right to be free from cruel and unusual punishment, and also violated his right to equal protection because several days before Petitioner was denied a replacement meal, a white inmate was given a replacement sack dinner. Petitioner's constitutional claims lack probable merit.

Prison conditions violate an inmate's Eighth Amendment right to be free from cruel and unusual punishment only when the conditions deny the inmate the minimal civilized measure of life's necessities. *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S. Ct. 2392, 2399 (1981). Nutritionally adequate food is unquestionably one of the necessities of life to which inmates are constitutionally entitled. *Hoptowit v. Ray*, 682 F.2d 1080, 1107 (9th Cir. 1986). Besides showing an objectively serious deprivation, an inmate attempting to establish an Eighth Amendment claim must also demonstrate that prison officials were deliberately indifferent to the inmate's condition. *Wilson v. Seiter*, 501 U.S. 294, 303, 111 S. Ct. 2321,

¹ The Superior Court's April 19, 2010 order denying Petitioner's motion to waive filing fee and proceed in forma pauperis states only that the court "considered the records and files herein".

2327 (1991). Accordingly, a prison official must actually know of and disregard an excessive risk to an inmate's health or safety to be liable under the Eighth Amendment. *Farmer v. Brennan*, 511 U.S. 825, 840-44, 114 S. Ct. 1970, 1980-82 (1994).

Numerous authorities establish that the occasional denial to a prisoner of a meal or two does not constitute cruel and unusual punishment under the Eighth Amendment. *Bellamy v. Bradley*, 729 F.2d 416 (6th Cir. 1984); *Talib v. Gilley*, 138 F.2d 211 (5th Cir. 1998); *Brewton v. Hollister*, 948 F. Supp. 244 (W.D.N.Y. 1996); *Wilkins v. Roper*, 843 F. Supp. 1327 (E.D. Mo. 1994); *Prisoner's Legal Ass'n v. Roberson*, 822 F. Supp. 185 (D.N.J. 1993); *Islam v. Jackson*, 782 F. Supp. 1111 (E.D. Va. 1992); *Gardner v. Beale*, 780 F. Supp. 1073 (E.D. Va. 1991). Petitioner does not allege and cannot establish that missing a single meal caused him the objectively serious harm required to establish an Eighth Amendment violation. *Id.* As such, the Superior Court did not err in not allowing Petitioner to proceed with his Eighth Amendment claim at public expense as this claim lacks probable merit.

Petitioner's discrimination claim is equally meritless. This claim is based entirely on Petitioner's allegation that three days before he was denied a replacement sack lunch, a white inmate received a replacement sack lunch. Petitioner's complaint provides no information concerning the

circumstances of the white inmate receiving a replacement sack lunch, therefore it is entirely speculative whether Petitioner was denied a single replacement sack lunch because of his race. The Superior Court therefore did not err in failing to allow Petitioner to proceed at public expense on his equal protection/discrimination claim as this claim lacks probable merit.

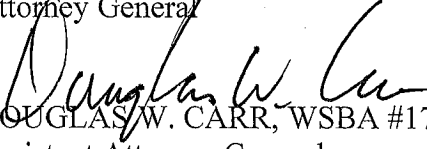
VI. CONCLUSION

While it appears that the Superior Court and the Court of Appeals erred in treating Petitioner's civil damages action as a PRP, discretionary review should nonetheless be denied as the Superior Court did not err in denying Petitioner's motion to proceed at public expense in a case that does not have probable merit.

For the foregoing reasons, Respondent requests that Petitioner's motion for discretionary review be denied.

RESPECTFULLY SUBMITTED this 18th day of February, 2011.

ROBERT M. MCKENNA
Attorney General


DOUGLAS W. CARR, WSBA #17378
Assistant Attorney General
Corrections Division
PO Box 40116
Olympia WA 98504-0116
(360) 586-1445

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing ANSWER TO
PETITIONER'S MOTION FOR DISCRETIONARY REVIEW on all
parties or their counsel of record as follows:

- ☒ US Mail Postage Prepaid
- ☐ United Parcel Service, Next Day Air
- ☐ ABC/Legal Messenger
- ☐ State Campus Delivery
- ☐ Hand delivered by _____

TO:

CARLOS JOHN WILLIAMS, DOC #973053
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA WA 99632

EXECUTED this 18th day of February, 2011 at Olympia, WA.



CHERRIE KOLLMER